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April 28, 1997

Via Hand Delivery

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Service Obligations; Comments of the Small Cable Business Association; Comments to the Initial Regulatory Flexibility Analysis; MM Docket No. 93-25

Dear Mr. Caton:

We enclose for filing an original and 4 copies of the Comments of the Small Cable Business Association in the above-referenced matters. Also enclosed is a copy to date-stamp and return to the courier.

Very truly yours,

Howard & Howard



Eric E. Breisach

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Enclosures

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Implementation of Section 25 of the)
Cable Television Consumer Protection and)
Competition Act of 1992,)
Direct Broadcast Satellite Service Obligations)

MM Docket No. 93-25

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*Federal Communications Commission
Office of Secretary*

**COMMENTS OF THE
SMALL CABLE BUSINESS ASSOCIATION**

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April 28, 1997

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SUMMARY

During the four years that judicial challenges delayed this rulemaking, the DBS industry has transformed itself from a “fledgling industry” offering few channels to few subscribers, to one backed by media giants and currently offering hundreds of channels to over 4 million customers. Sounds great, doesn’t it? Not really. There’s a crack in the federal policy dam. When the dam gives way, local programming as we know it will no longer exist. The impact will hit rural America -- mostly served by small cable -- the hardest.

DBS Harms Local Programming

DBS offers a generic national broadcasting service that does not require the infrastructure or incur the regulatory costs associated with providing local programming services. Every customer DBS claims reduces broadcast viewership and possibly cable viewership. Continued erosion of broadcast viewership will threaten the financial viability of “free TV” relied on by 35% of all Americans. It will also remove a significant source of local programming carried on cable.

The loss of local programming sources will eliminate sources of critical information to community residents, including:

- Local news
- Local sports
- Local public affairs
- Local emergency notification
- Public, education and government access
- Local business advertising
- Local political advertising

Congress and the Commission have formed communications policy around the principle of localism for the past 63 years. Congress recently reaffirmed the importance of local programming and ordered the Commission to regulate DBS to prevent it from harming localism.

Establish Regulatory and Financial Parity

SCBA presents a plan to establish regulatory and financial parity in a way that helps preserve local programming. By leveling the competitive playing field, the Commission will pave the way for long-term competition. Without parity, the cost savings that DBS providers enjoy by avoiding local programming obligations will allow them to continue competing unfairly, placing providers of local programming at substantial risk.

Program Regulation Parity

The Commission must establish parity in the regulation of program carriage. The cornerstone of these regulations, must-carry, must apply to DBS as well. DBS providers do not have a unified position regarding local signal carriage. At best, one provider might carry some signals in some communities. At worst, another provider might not carry any local signals. Even where carried, DBS providers will likely seek compensation from broadcasters, offsetting any financial benefit the stations should receive from mandatory carriage. In addition to must-carry, the Commission must extend all other program carriage restrictions to DBS, including distant signal importation limits and sports blackout provisions.

SCBA recognizes that DBS providers cannot implement must-carry overnight. Some announced plans will take years, if not longer. Regardless of the timelines, DBS' harm to local programming increases every day. The Commission needs a must-carry plan that accommodates this reality while helping local programming today. SCBA suggests that the Commission allow DBS providers to opt-out of the must-carry requirements in any market so long as they contribute a percentage of gross revenues received from subscribers in that market into a national fund designed

to support local programming efforts. Payments to this fund would offset the harm inflicted by DBS' failure to carry local programming.

Financial Parity

The Commission must also create regulatory parity with respect to the financial burdens imposed on small cable as a result of maintaining a distribution facility capable of delivering local programming. DBS providers, even after including spectrum fees, require only 10 percent of the initial capital investment of small cable -- the difference being that small cables' systems must have the capability to deliver local programming. Congress recently faced a similar issue when it imposed federal requirement on open video system ("OVS") to make payments equal to those of incumbent cable operators -- even though incumbent local exchange carriers argued their preexisting rights to occupy the streets and rights-of-ways. The Commission, under its mandate and authorization to prevent harm to localism, should require DBS providers to make the following payments:

- ◆ **Surrogate for franchise fees** - Five percent of gross paid to either local governments or to a local programming support fund.
- ◆ **PEG funding** - A national average per subscriber amount contributed to either local governments, PEG access groups or a local programming support fund.
- ◆ **Other franchise costs** - A national average per subscriber amount contributed to either local governments or a local programming support fund.
- ◆ **Local property tax** - An equivalent amount paid to local governments.

Enforceable Parity

SCBA members have evidence of widespread violations of current broadcast signal carriage prohibitions. SCBA members have little opportunity to enforce these violations. The Commission

must give any aggrieved party, including small cable, the right to seek redress. To give the provisions teeth, the enforcement provisions should allow recovery of significant statutory damages and attorneys fees.

SCBA asks the Commission to take action to impose significant regulation on relatively new providers of multi-channel video programming services. DBS has about the same number of subscribers that cable did when the Commission imposed significant regulation, including must-carry requirements, in 1965. SCBA's proposal allows the development of fair competition without government providing advantages to any provider. This represents the only playing field where competition can exist in the long-term.

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Implementation of Section 25 of the)	
Cable Television Consumer Protection and)	MM Docket No. 93-25
Competition Act of 1992,)	
Direct Broadcast Satellite Service Obligations)	

**COMMENTS OF THE
SMALL CABLE BUSINESS ASSOCIATION**

I. INTRODUCTION

The Commission's inquiry to determine the public interest obligations of direct broadcast satellite ("DBS") providers seeks to satisfy two distinct components of public interest: (1) general public interest; and (2) local public interest referred to as "localism." The focal point of localism is local programming. DBS providers have the greatest impact on local programming in less densely populated areas -- areas most frequently served by small cable. The Small Cable Business Association ("SCBA") focuses these comments on local programming concerns.

Formed nearly four years ago, SCBA today represents almost 300 small cable operators, most of whom have 1,000 or fewer subscribers. SCBA began as small operators banded together to cope with the regulatory burdens imposed by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). Today, SCBA remains active in many Commission rulemakings, ensuring that the Commission understands the unique impact its regulations have on small cable and customers of small cable.

II. UNFETTERED GROWTH AND DEPLOYMENT OF DBS THREATENS THE VIABILITY OF LOCAL PROGRAMMING, ESPECIALLY IN RURAL AMERICA.

A. The Commission has a Statutory Duty to Protect Localism from DBS Inflicted Harm.

1. The Commission has a statutory duty to protect and promote local programming.

The Commission must draw an important distinction between imposing local programming obligations on a multi-channel video programming provider and acting to preserve and foster local programming. The Commission has declared the former as optional.¹ In all cases, however, the latter has always been mandatory. As discussed below, Congress clarified matters by mandating that the Commission regulate DBS's impact on localism.

a. Section 307(b) of the Communications Act requires the Commission to promote localism.

Congress first mandated localism in 1934 as part of the Communications Act of 1934:

The Commission shall make such distribution of licenses . . . among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same.²

Under this general mandate, the Commission previously declared that it had the authority to authorize a national broadcasting service such as DBS that was exempt from any local programming or ownership requirements.³

¹*Report and Order*, Direct Broadcast Satellites, 90 FCC 2d 676 (1982) (the Commission determined that it had the authority to authorize a nonlocal broadcast service without violating its statutory mandate to foster localism).

²47 U.S.C. § 307(b).

³*Report and Order*, Direct Broadcast Satellites, 90 FCC 2d 676 at 686 (1982).

b. The 1992 cable act mandates protection of localism from DBS.

Congress directed the Commission either to enact rules that require the carriage of local programming on DBS or, in the alternative, regulate DBS to protect local programming from the siphoning of viewers by DBS:

The Commission shall, within 180 days after the date of enactment of this section, initiate a rulemaking proceeding. . . . Such proceeding also shall examine the opportunities that the establishment of direct broadcast satellite service provides for the principle of localism under this Act, and the methods by which such principle may be served through technological and other developments in, or regulation of, such service.⁴

The Commission concisely, but not completely, articulated the task Congress placed before it:

[W]e interpret Congress' directive to be that we consider whether a national mode of programming service such as DBS can accomplish the long standing goal of service to individual communities.⁵

This interpretation misses a key point by ignoring the clause on the other side of the conjunction "or." In addition to requiring the Commission's examination of how DBS can advance localism, it also requires the Commission to regulate DBS providers to the extent necessary to protect localism. The following excerpt illustrates the portion of the mandate omitted from the Commission's analysis:

Such proceeding shall examine the methods by which such principle [localism] may be served through . . . regulation of. . . such [DBS] service.⁶

This is the only construction of the Congressional mandate that does not render the clause "or regulation of" superfluous.

⁴47 U.S.C. § 335(a).

⁵8 FCC Rcd 1589 at 1595 (1993).

⁶47 U.S.C. § 335(a).

The Congressional mandate requires the Commission to either impose on DBS providers obligations to provide local programming or, if DBS does not provide local programming, to restrict DBS in order to protect local programming. Because some DBS operators will provide no local programming in any market⁷ and others may provide some local programming in some markets,⁸ the Commission must impose restrictions on DBS providers to preserve existing local programming outlets. Congress gave the Commission a broad grant of authority to craft such regulations.

2. Both the Commission and Congress have Acted to Preserve Localism.

a. The Commission has woven the principle of localism throughout its regulatory scheme.

Localism has served as the cornerstone of communications policy and regulation for the last 63 years. The Commission has acted aggressively during this period to reign in fast growing new media in order to promote and preserve localism. A brief review of the extensive precedent helps put the issue in perspective.

- ◆ **Chain Broadcasting Rules.** In 1941, as network programmers gained increasing control over the programming of their affiliates, the Commission acted to severely restrict the terms that networks could demand in their affiliation agreements.⁹ By limiting network influence on programming, the Commission effectively returned program control to the hands of local management. At the time, this represented a

⁷Testimony of Stanley Hubbard, President and CEO, Hubbard Broadcasting, Transcript of Hearings before the Senate Committee on Communications, Science and Technology, April 10, 1997 (“Hearing Transcript”) at 24.

⁸Testimony of Rupert Murdoch, CEO, The News Corporation, Hearings Transcript at 9.

⁹*Report on Chain Broadcasting*, Commission Order No. 37, Dkt. 5060 (May 1941).

bold action as radio networks had greatly fostered the growth and development of the radio broadcasting industry.

- ◆ **Broadcast License Distribution.** In 1952, the Commission developed a table of assignments that reserved frequencies in 1,274 communities, ensuring that each would have the spectrum available for at least one local broadcast station. The Commission believed that this “protects the interests of the public residing in smaller cities and rural areas more adequately than any other system for distribution of service”¹⁰
- ◆ **Local Origination.** In 1969, the Commission initiated a rule requiring large television operators to originate a significant amount of local programming to both ensure diversity of views and also to satisfy local programming needs.¹¹
- ◆ **Must-Carry Rules.** The Commission first imposed a mandate to carry local broadcast signals in 1965 -- at a time when cable was only seven years old and served only 5 million subscribers.¹² The Commission justified its actions as necessary to ensure the financial viability of broadcast programming. The Commission attempted to enforce mandatory carriage over the ensuing 30 years despite successful court challenges to its Constitutional validity.
- ◆ **Distant Signal Importation Limits.** The Commission has also limited a cable operator’s ability to import signals from other markets that might compete with local broadcast signals. In 1972, the Commission created market quota rules through the

¹⁰*Sixth Report and Order*, 41 FCC 148 (1952).

¹¹*First Report and Order*, 20 FCC 2d 201 (1969).

¹²Testimony of Amos Hostettler, CEO, Continental Cablevision, Hearing Transcript at 6.

may-carry rules.¹³ Under those rules, operators could only import a certain number of distant signals. The Commission currently maintains restrictions prohibiting the importation of duplicative network programming (network non-duplication rules) and similar rules governing syndicated programming (syndicated exclusivity rules).

b. Congress has recently acted to perpetuate localism.

As recently as 1992, Congress passed legislation squarely aimed at preserving localism:

- ◆ **Must-Carry.** Congress, relying on the need to preserve localism in television broadcasting, mandated cable carriage of local broadcast signals.¹⁴

A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.

Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.¹⁵

- ◆ **DBS Localism Rulemaking.** As discussed fully above, Congress has mandated that the Commission, through either affirmative obligations or other regulation, ensure that DBS fosters, or at a minimum does not harm, localism.¹⁶

¹³*Cable Television Report*, FCC 72-108 (1972).

¹⁴47 U.S.C. §§ 534 and 535.

¹⁵1992 Cable Act at § 2(a)(10) and (11).

¹⁶47 U.S.C. § 335(a).

B. Continued growth of DBS threatens to destroy vital local programming sources.

1. Escaping local programming obligations has allowed DBS explosive growth.

In the four short years since the Commission last considered imposing regulations on DBS providers, the profile of the DBS industry has changed significantly. In the 1993 *NPRM*,¹⁷ the Commission refused to place requirements or restrictions on DBS to protect localism, citing an experimental industry in its infancy:

Our tentative view, however, is that if a local DBS service is not technically and economically feasible, other regulations should not be considered in this area given that DBS is a fledgling industry and that there is an abundance of local broadcast stations and cable television systems that are already serving local needs.¹⁸

Today, the Commission finds an industry experiencing explosive growth, offering large numbers of channels and backed by major media companies:

- ◆ **Explosive subscriber growth.** The Commission reported almost 4 million DBS subscribers as of October 1996, with at least one service growing by as much as 140,000 subscribers a month.¹⁹ The Commission has noted that “DBS services have grown at a rate making DBS receiving equipment one of the most successful new consumer electronics product introductions in history in terms of units sold.”²⁰

¹⁷*Notice of Proposed Rulemaking*, MM Docket No. 93-25 (released March 2, 1993) 8 FCC Rcd 1589 (“*NPRM*”).

¹⁸8 FCC Rcd 1589 at 1596 (1993).

¹⁹*Third Annual Report*, In the Matter of the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 63-133 (released January 2, 1997) (“1996 *Competition Report*”) at Appendix C, Tables 1 and 2.

²⁰*Id.* at ¶ 40.

- ◆ **Vast expansion of channel offerings.** Since releasing the *NPRM*, at least one DBS provider has increased its channel offerings by almost 900%. In 1993, the Commission noted that Primestar offered 11 channels of programming.²¹ In 1997, the Commission noted that Primestar provided 95 channels, with plans to expand to 150 channels.²² Other DBS providers also offer a large number of channels:

DBS Provider	Number of Channels Offered ²³
DIRECTV/USSB	200
Primestar	95 (plans to expand to 150)
EchoStar	Over 100
American Sky Broadcasting ("ASkyB")	150 planned

These channel totals illustrate that DBS has progressed far beyond an experimental service. With the proposed merger of EchoStar and ASkyB, a new class of DBS provider will be born before the end of this year. Occupying two full orbital slots with the capability of delivering 250 or more channels, DBS has become a formidable competitor to cable, especially small cable that must invest significant capital to construct and maintain the infrastructure necessary to deliver local programming to subscribers in rural America.

- ◆ **Large Media Companies Backing DBS.** The participation of several large cable MSOs in Primestar is dwarfed by the entry of ASkyB's owner, media giant The News Corporation, and

²¹8 FCC Rcd 1589 at 1591, n.14.

²²1996 *Competition Report* at ¶ 41.

²³1996 *Competition Report* at ¶ 41.

its partner MCI Communications. This merger will consolidate two full orbital slots in a major media company with staggering financial and programming resources. DBS has moved well beyond the “fledgling industry” that the Commission recommended not regulating four years ago.²⁴

2. One DBS provider seeks to eliminate cable and the local programming it provides.

The CEO of ASkyB, Preston Padden, has publicly stated his intent to drive cable from the competitive landscape. He has warned that “the cable guys will have to be calling for Dr. Kevorkian.”²⁵ This declaration evidences that the most formidable DBS provider seeks not to merely compete with traditional cable, but to replace it and become the exclusive provider of multichannel video programming services. This task may prove challenging against large MSOs in large urban markets. EchoStar/ASkyB may find the task much easier in smaller markets.

Local programmers in smaller markets are more vulnerable due to their higher cost of delivering programming. Small cable has made significant capital investment in plant and equipment and incurs the higher cost necessary to make possible the delivery of local signals to more rural, less densely populated areas.²⁶ DBS has not incurred such significant capital investments to serve rural areas. The following chart shows the disparities:

²⁴*NPRM* at ¶ 36.

²⁵*Sky Vows Air War on Cable: Murdoch's \$1 Billion Deal*, Electronic Media, March 3, 1997 at 1.

²⁶*Sixth Report and Order and Eleventh Order on Reconsideration*, MM Docket Nos. 92-266 and 93-215 (released June 5, 1995) (“*Small Systems Order*”) at ¶ 56.

Service	Capital Investment per Subscriber
DBS	\$87.50 ²⁷
Small Cable	\$750 - \$1,500 ²⁸

Small cable provides mutli-channel video programming services with local content in areas of the United States typically ignored by others. The Commission's analysis must consider that this makes small cable unusually susceptible to challenges by generic national programming delivered by those without any duty, intent or ability to offer local programming as an integrated component of their service in all markets.²⁹

3. Local programming in smaller markets.

a. Types of local programming at risk.

Due in large part to the Commission's efforts to foster localism, residents of this Country enjoy the benefits of a large variety of local programming. They include:

- (1) Local news

²⁷Prepared Testimony of Rupert Murdoch before the Senate Committee on Commerce, Science and Transportation ("Prepared Testimony") reports total initial capital investment of \$700 million with a target of 8 million customers within 5 years.

²⁸This represents the average cost of small cable aerial plant construction divided by average rural densities. Because the rural densities can range widely, the cost per subscriber can widely vary. In all cases, however, the capital investment of a small operator significantly exceeds that of a DBS provider.

²⁹DBS providers do not have a consistent plan for delivery of local programming. Mr. Hubbard has testified to Congress that "I can tell you we're not going to follow suit and we and DIRECTV are not going to present local stations." Hearing Transcript at 24. EchoStar/ASkyB, on the other hand has presented different stories. Initially, its executives stated the intent to provide local programming to 75% of television households. *News Corp., EchoStar Woo TV Stations*, Multichannel News, March 17, 1997 at 5, citing AskyB CEO Preston Padden. Less than a month later, Mr. Murdoch testified to the Congress that EchoStar/ASkyB would use alternate technology to provide local programming in all markets. Hearing Testimony at 9. Mr. Murdoch made it clear, however, that his service would not carry all local stations.

- (2) Local sports
- (3) Local public affairs and political interest
- (4) Local emergency notification
- (5) Public, education and government ("PEG") access
- (6) Local business advertising
- (7) Local political advertising (election campaigns)

b. Types of local program providers at risk.

These types of local programming cannot continue without those who produce and distribute the programming. The prospect of continued and increasing unfair competition from DBS, a provider that escapes all local public interest obligations, threatens to eliminate these sources of local programming.

(1) Off-air broadcasters.

For the past 32 years, the Commission has vigorously asserted that local off-air broadcast stations cannot survive without guaranteed carriage on cable. The Commission's first attempt reaches back to 1965 when cable had only 5 million subscribers nationally.³⁰ In recent years, broadcast station revenues continued to decline³¹ as the courts repeatedly struck down the

³⁰*Turner Broadcasting System, Inc. v. Federal Communications Commission*, No. 95-992, slip op. at 57 (March 31, 1997).

³¹Broadcast advertising revenues declined in real terms by 11 percent between 1986 and 1991. *Turner* slip op. at 57.

Commission's efforts to craft an enforceable carriage requirement and as viewers have had increased access to multi-channel video options.³²

Congress intervened to protect local broadcasters by mandating carriage as part of the 1992 Cable Act. Congressional findings of the harm and the risk of the financial collapse of even a few broadcasters mandated the imposition of significant signal carriage requirements:

A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation.

Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.³³

Congress also reiterated the critical importance of maintaining the viability of "free TV" and its ability to create local programming. Congress found that if not carried by cable:

[T]he economic viability of free local broadcast television and its ability to originate quality local programming will be seriously jeopardized.³⁴

In defending the must-carry statute against the First Amendment challenge, the government:

"downplays the importance of showing a risk to the broadcast industry as a whole and suggests the loss of even a few broadcast stations "is a matter of critical importance."³⁵

In upholding the must-carry statute, the Supreme Court validated the government's two key considerations:

³²Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") at § 2(a)(13).

³³1992 Cable Act at § 2(a)(10) and (11).

³⁴*Id.* at § 2(a)(16).

³⁵*Turner*, slip op. at 18.

The Government's assertion that "the economic health of local broadcasting is in genuine jeopardy and in need of the protections afforded by must-carry," [citations omitted] rests on two component propositions: First, "significant numbers of broadcast stations will be refused carriage on cable systems" absent must-carry [citations omitted] "Second, the broadcast stations denied carriage will either deteriorate to a substantial degree or fail altogether."³⁶

All television stations will be adversely impacted if not carried on a multi-channel video programming provider that has significant viewership. As noted by the Supreme Court, a five percent reduction in cable viewers would result in an almost \$1.5 million reduction in gross revenue of a large market station.³⁷ The amount of revenue loss for a small market would be less; however, it would still have the same proportionate impact because a small station has a smaller budget.

SCBA has never had a significant concern about the must-carry requirement. SCBA acknowledges that small cable and small television stations need each other. As noted by SCBA's former Chairman, David Kinley, in a recent viewpoint editorial, small broadcasters provide small cable with not only product, but local product that differentiates it from other multi-channel video programming providers.³⁸ Small broadcasters, on the other hand, cannot survive without the audience it reaches on small cable. The combination of small cable and small broadcast serves the principle of localism.

DBS and cable pose an identical threat to broadcasters if they do not carry local broadcast signals. As DBS penetration increases, the harm it inflicts on small broadcasters will increase. As discussed later in these comments, DBS providers plan either no local broadcast carriage, or only

³⁶*Id.* at slip op. at 28.

³⁷*Turner* slip op. at 53.

³⁸*Multichannel News*, Vol. 18, No. 16, April 21, 1997 at 57.

carriage of some signals in some markets. Unless the Commission mandates DBS carriage of all local broadcast signals, broadcasters, especially small market broadcasters, face a bleak future.

The loss of a local broadcasters adversely affects the entire community. It will impact not just cable subscribers but also the 35% of the population that relies on “free TV” for all programming. Local broadcaster originated news, sports and public affairs programming and local business’ ability to advertise will vanish. Many small and local businesses rely on local broadcasters as one of their only outlets for video advertising.³⁹ Political candidates also lose the ability to reach voters.

(2) Small cable.

(a) Programming originated by the cable operator.

Many cable systems offer two important aspects of original local programming: (1) public, government and education access programming; and (2) local interest programming created by the cable operator. Congress recognized the benefits of making cable systems a forum for speech by the public at large, as well as governmental and educational institutions when it granted express authority for local franchising entities to mandate dedicated channels and support for PEG operations as part of the 1984 Cable Communications Policy Act (“1984 Cable Act”).⁴⁰

Almost half of all cable systems report offering locally originated programming of varying degrees.⁴¹ While larger market cable systems often offer regularly scheduled programs, many small

³⁹Even local businesses that sell national name brand products such as new car dealers rely heavily on local video advertising. The reduction of even one broadcast station will harm advertisers as the rates for broadcast advertising will increase as the number of total advertising availabilities in the market shrink.

⁴⁰47 U.S.C. § 531.

⁴¹Television and Cable Factbook, at I-80, reporting that out of 11,112 cable systems, 4,783 originated programming, with another 697 planning to offer originations. SCBA believes this statistic

systems offer frequent insertions of local programming including local public service announcements, telecast of community events, meet the candidate nights or high school sports. Many times the offerings of cable operators represent programming shunned as commercially impracticable by local broadcasters serving broader areas. Cable has provided the sole source of these programs.

None of various local program carriage plans announced by DBS have included this level of local public interest programming. At best, DBS can spot beam or otherwise arrange for carriage of local broadcast stations into television markets. DBS cannot, however, replicate the level of local programming provided by small cable in rural America.

(b) PEG originated programming.

The DBS local programming plans ignore PEG access. Congress validated the need for cable systems to provide this important forum for publication and distribution of public, educational and governmental programming in the 1984 Cable Act.⁴² Thousands of cable systems offer PEG access that ranges from multiple full-time channels to part-time character generated community bulletin boards. In addition to providing open forums for public speech, PEG access allows citizens to view the operation of government from their living rooms. PEG access has become a vital source of vibrant community-based programming that does not exist in a DBS world.

(c) Local advertising insertions.

Cable systems currently provide an important access vehicle for local advertising. Almost 3,000⁴³ cable systems offer local advertising insertions over the feeds of national satellite delivered

underreports the originations of small systems that produce original programming on a regular basis.

⁴²47 U.S.C. § 531.

⁴³*Television and Cable Factbook No. 64*, at I-80.

programming services. Referred to as “ad avails,” they provide low-cost video advertising. Even more systems offer character-generated crawls across various channels including program guides and some satellite delivered networks such as The Weather Channel.

DBS does not have the ability, nor does it claim that it will have the ability, to insert local advertising. DBS will provide unaltered national satellite feeds, or if overlaid, will overlay with national advertising. Local businesses and candidates for elected office will only have broadcast television to distribute their video messages.

III. THE COMMISSION MUST ESTABLISH COMPLETE REGULATORY AND FINANCIAL PARITY AIMED AT PRESERVING LOCAL PROGRAMMING.

A. No Continuing Justification Exists to Provide DBS with Special Treatment.

1. The unequal regulatory framework.

DBS is a victim of its own success. Its rapid growth and backing by media giants should no longer entitle it to relaxed regulatory burdens as a “fledgling industry.”⁴⁴ Contrast DBS with another form of multi-channel video programming competitor created by Congress last year. As part of the Telecommunications Act of 1996, Congress created open video systems (“OVS”) as a vehicle for local exchange carriers and others to provide wire-line competition to cable.⁴⁵ Congress carefully created regulatory parity with respect to most issues. The following chart shows the regulatory disparity between DBS, OVS and cable:

⁴⁴*NPRM* at ¶ 36.

⁴⁵47 U.S.C. § 573.

Regulation	DBS	OVS	Cable
Must-carry	No	Yes	Yes
Network non-duplication	No	Yes	Yes
Syndicated exclusivity	No	Yes	Yes
Sports blackout	No	Yes	Yes
Commercial leased access (10% - 15%)	No	Yes	Yes
Public interest set aside (4% - 7%)	Possible	No	No
Political broadcasting	Possible	Yes	Yes
Children's programming commercial limits	No	Yes	Yes
Franchise fees	No	Comparable	Yes
PEG access	No	Comparable	Yes
Other franchise obligations	No	Comparable	Yes
Local taxation	No	Yes	Yes

2. "Television is television."

In a recent hearing before the Senate Commerce, Science and Transportation Committee, Senator McCain said it best:

Television is television, regardless of whether it's delivered over the air by broadcasting, through wire or fiber, by cable, by microwave for multi-channel, multi-point distribution systems, or from satellite by DBS.⁴⁶

SCBA agrees with Senator McCain. Congress has established a national telecommunications policy that it should apply equally to all programming providers. Congress endorsed this philosophy when it established OVS that, for the most part, have identical or equivalent rights and obligations

⁴⁶Hearing Transcript at 1.